

STATE OF MICHIGAN
COURT OF APPEALS

HOME-OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

ELIAS CHAMMAS and CHAMMAS, INC., d/b/a
PARADISE MINI MART,

Defendants,

and

COREY PARKS,

Defendant-Appellant.

UNPUBLISHED
September 10, 2013

No. 310157
Genesee Circuit Court
LC No. 09-092739-CK

HOME-OWNERS INSURANCE COMPANY,

Plaintiff-Appellee,

v

ELIAS CHAMMAS and CHAMMAS, INC., d/b/a
PARADISE MINI MART,

Defendants-Appellants,

and

COREY PARKS,

Defendant.

No. 310167
Genesee Circuit Court
LC No. 09-092739-CK

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

This declaratory judgment action arises from a shooting at the Paradise Mini Mart in Flint. Elias Chammas (Elias), the sole shareholder of Chammas, Inc. (the corporation that owns the mini mart), shot Corey Parks in the business's parking lot. Elias claimed that he intended only to frighten Parks, but subsequently pleaded guilty to a firearm offense. Parks filed suit against Elias and Chammas, Inc.

Home-Owners Insurance Company insured Elias and Chammas, Inc. pursuant to an occurrence-based insurance coverage from. They each requested that Home-Owners defend and indemnify in the suit brought by Parks. Home-Owners filed this separate insurance coverage action arguing that Elias intentionally shot Parks and therefore the incident was not an "accident" or a covered "occurrence" under the policy.¹

Home-Owners sought summary disposition in its favor, which the circuit court denied. This Court reversed as to Elias and remanded for further consideration in relation to Chammas, Inc. This Court held that Elias's intentional act of shooting Parks was not an "accident" and therefore did not fall within the definition of a covered "occurrence" under the policy. *Home-Owners Ins Co v Chammas*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2011 (Docket No. 299412) (*Home-Owners I*), unpub op at 3.

However, the Home-Owners policy contained a "separation of insureds" provision that had not been considered by the circuit court. In other words, this Court determined that the circuit court had failed to treat Elias and Chammas, Inc. as separate entities when rendering its coverage decision. Accordingly, this Court remanded for further consideration of the coverage issue in relation to Chammas, Inc. *Id.*

On remand, the circuit court conducted a bench trial and, after considering Elias and Chammas, Inc. as separate insured parties, concluded that the shooting was not a covered occurrence in relation to either party. The circuit court ruled that Home-Owners was not required to defend or indemnify either insured. We affirm.²

I. STANDARD OF REVIEW

We review findings of fact in a bench trial for clear error and conclusions of law de novo. *Florence Cement Co v Vettraino*, 292 Mich App 461, 468; 807 NW2d 917 (2011). "Whether the trial court followed this Court's rulings on remand" and "whether the law-of-the-case doctrine applies and to what extent it applies" are also legal questions that we review de novo. *Lenawee*

¹ A panel of this Court previously stated that Home-Owners was appealing an unsuccessful motion for summary disposition filed in Parks' civil action. *Home-Owners I*, unpub op at 2. This statement was incorrect as evidenced by Home-Owners' designation as the plaintiff in this case. The civil complaint filed by Parks also bears a different lower court docket number.

² The circuit court also concluded on remand that Elias was the alter ego of Chammas, Inc. and "the corporation [was] being used to subvert the clear intent of the insurance policy." It was unnecessary for the court to reach that issue and we decline to review its analysis in this regard.

Co v Wagley, __ Mich App __; __ NW2d __ (Docket No. 311255, issued May 21, 2013) (slip op at 6) (citations and quotation marks omitted).

“[W]e examine the language of the insurance policies and interpret their terms in accordance with well established Michigan principles of construction.” *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

An insurance policy must be enforced in accordance with its terms. We will not hold an insurance company liable for a risk it did not assume.

In interpreting ambiguous terms of an insurance policy, this Court will construe the policy in favor of the insured. However, we will not create ambiguity where the terms of the contract are clear. Where there is no ambiguity, we will enforce the terms of the contract as written.

Furthermore, this Court will interpret the terms of an insurance contract in accordance with their “commonly used meaning.” We take into account the reasonable expectations of the parties. [*Id.* at 111-112 (citations omitted).]

II. ANALYSIS

Despite the contentions of Parks, Elias and Chammas, Inc. (collectively “defendants”), the circuit court acted within the parameters of this Court’s opinion in *Home-Owners I*. The circuit court accepted that Elias’s act of shooting Parks was not a covered occurrence and, based on the absence of such an occurrence, correctly deemed that the policy could not apply to Chammas, Inc.’s claim for coverage.

A. POLICY LANGUAGE

Pursuant to § I.A.1.b(1), the subject insurance policy applies “only if” the claimed damages are “caused by an ‘occurrence.’” An “occurrence” is defined under the policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The policy specifically excludes from coverage “[b]odily injury” or “property damage” expected or intended from the standpoint of the insured.” This provision is also known as the “expected or intended injury” exclusion. The policy also includes a “separation of insureds” provision which states that the policy applies to each insured “as if [it was] the only Named Insured” and “[s]eparately as to each insured against whom claim is made or ‘suit’ is brought.”

B. LAW OF THE CASE

Before we reach the substance of the current coverage dispute, we must parse the holdings in *Home-Owners I* as the parties disagree regarding the meaning and effect of this Court’s prior decision.

Relevant to the current appeal, this Court previously determined that “[b]ecause [Elias] fired intentionally and both shots clearly created a direct risk of harm or bodily injury, the shooting cannot be deemed an ‘accident.’” The shooting therefore did not meet the definition of

an occurrence under the policy and the coverage was inapplicable. *Home-Owners I*, unpub op at 3. In relation only to Elias individually, this Court determined that the lack of a covered occurrence rendered moot Home-Owners' alternate argument that the "expected or intended injury" exclusion negated coverage. *Id.*

This Court also stated:

Finally, in the lower court defendants raised the issue of whether [Home-Owners] was required to defend and indemnify Chammas, Inc. . . . as a named insured to the policy under an alter ego theory. The trial court denied [Home-Owners'] motion for summary disposition on other grounds, and declined to address this issue. [The opinion then quoted the separation-of-insureds clause described above.]

Because the policy requires separate application to each insured, and the trial court did not address this issue as it relates to Chammas, Inc., we remand to the trial court because the record is insufficient for us to make a determination on the alter ego theory advanced by [Home-Owners]. We decline to address this issue and remand it back to the trial court for further factual development of the record and ultimately a decision on the merits. [*Id.*]

Home-Owners I included three holdings forming the law of the case: (1) the shooting was not an accident; (2) the bodily injury was not the result of an occurrence; and (3) the policy requires separate application to each insured.

The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. [I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The doctrine is applicable only to issues actually decided, either implicitly or explicitly, in the prior appeal. The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. [*Wagley*, __ Mich App at __ (slip op at 6) (citations and quotation marks omitted).]

"The doctrine applies only to those questions specifically determined in the prior decision and to questions necessarily determined in arriving at that decision." *McNees v Cedar Springs Stamping Co*, 219 Mich App 217, 222; 555 NW2d 481 (1996). In this case, therefore, the circuit court was bound by the three holdings stated above and was precluded from deciding those issues differently.

Home-Owners argues, "Because the Court of Appeals found no occurrence [in *Home-Owners I*, we] believe[] there is no need to examine whether Chammas, Inc. and Elias [] are alter egos of each other for purposes of this litigation." Home-Owners further implies that no consideration need be taken beyond the prior panel's conclusion that no occurrence exists.

Although we agree that the circuit court was not required to reach the alter-ego theory to resolve this case, we find Home-Owners' argument deceptively simplistic. This Court explicitly held that the separation-of-insureds clause requires separate application to each insured and remanded for further consideration. *Home-Owners I*, unpub op at 3. Accordingly, even though there was no coverage for Elias, the circuit court properly considered whether coverage applied to Chammas, Inc.

Defendants, on the other hand, incorrectly posit that "the controlling issue" from *Home-Owners I* is "whether the alter ego theory could be applied to prevent the application of the policy's 'Separation of Insured' [sic] clause" and that "the only path around [the separation-of-insureds clause] is the alter ego theory." While *Home-Owners I* suggests analysis of the alter ego theory while giving each insured separate consideration under the policy, this Court in no way required a resolution of this case based on that ground.

C. APPLICATION OF POLICY TO CHAMMAS, INC.

Defendants argue that the separation-of-insureds clause mandates that it be treated separately and, because Elias's act of shooting Parks was neither expected nor intended by Chammas, Inc., Home-Owners cannot avoid coverage. Viewing the policy separately, from the standpoint of Chammas, Inc. (regardless of whether Chammas, Inc. and Elias are alter egos) there still is no coverage for Chammas, Inc.

The insurance policy applies only if there is bodily injury caused by an occurrence, which is defined as an "accident." "[A]n accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Frankenmuth*, 460 Mich at 114 (citation and quotation marks omitted). "[T]he definition of accident should be framed from the standpoint of the insured, not the injured party" *Id.* "[T]he appropriate focus of the term 'accident' must be on both 'the injury-causing act or event and its relation to the resulting property damage or personal injury.'" *Id.* at 115 (citation omitted). There is no coverage when "an insured acts intending to cause property damage or personal injury" or "an insured's intentional actions create a direct risk of harm." *Id.* at 115-116 (citation and quotation marks omitted).

This Court has already definitively concluded that the shooting was not an accident in relation to Elias. And this case, in which an intentional, nonaccidental act was committed by one insured and we are asked to consider whether coverage applies to a coinsured, is not novel.

In *Mich Basic Prop Ins Ass'n v Wasarovich*, 214 Mich App 319, 324; 542 NW2d 367 (1995), for example, this Court considered whether there was an occurrence with regard to one insured where the coinsured had committed intentional acts. Patricia and Joseph Wasarovich were divorced, but maintained a joint occurrence-based homeowner's policy on a house where Patricia then resided with August Feldt. *Id.* at 321. Joseph came to the house armed with a gun and engaged in a shooting spree, killing Feldt and injuring Patricia before taking his own life. *Id.* When Feldt's estate brought a negligence action against Patricia, the insurer claimed it had no duty to defend or indemnify her. *Id.* at 321-322.

The policy in *Mich Basic* did “not define an occurrence ‘from the standpoint of the insured.’” *Id.* at 327. (*Mich Basic* cited a case in which an incident would be viewed from the standpoint of the insured when considering an expected and intended injury exclusion, like that in this case, but did not actually answer whether the subject policy contained such a provision.) This Court concluded that in determining whether there was an “accident,” therefore it was required to view the incident from the standpoint “of the insured *who caused the injury*.” *Id.* at 327-328 (emphasis added). And a court “must consider *only the incident itself* in determining whether there was an occurrence.” *Id.* at 328 (emphasis added). The first question a court must answer is whether an incident “constitutes an accident” and only then can it consider whether the nonoffending coinsured “expected or intended the resulting injury.” *Id.*

Mich Basic “consider[ed] only the intent of the insured who caused the injury” and concluded that the shooting “was not an accident,” and therefore did not fall “within the policy definition of ‘occurrence.’” *Id.* Coverage was not triggered, rendering moot the issue of whether the bodily injury was expected or intended from Patricia’s point of view. *Id.* at 328-329.

Just as in *Mich Basic*, we must first discern whether the shooting was an accident from the standpoint of the insured who caused the injury—Elias. It is the law of the case that the shooting was not an accident from Elias’s standpoint. *Home-Owners I*, slip op at 3. Also as in *Mich Basic*, absent an accident, there was no occurrence and coverage was not triggered. Because the policy was not triggered, it is unnecessary to even consider the application or meaning of the expected or intended injury exclusion in relation to Chammas, Inc.

Defendants contend that *Mich Basic* is distinguishable because the policy in that case did not contain a separation-of-insureds provision. The existence of a separation-of-insureds provision does not negate or invalidate the prefatory portion of the policy, however, which affords coverage only for bodily injury as defined under the policy. The question whether a policy provides coverage is “the threshold issue.” *Mich Basic*, 214 Mich App at 325. Because bodily injury as defined by the policy must be caused by an accident, no coverage exists for either Elias or Chammas, Inc.

This would end our analysis except defendants have cited several cases from other jurisdictions for the proposition that an employer enjoys insurance coverage even though the acts of an employee were not covered. The cases cited by defendants, however, all involved claims of negligent supervision or negligent retention, while Parks raised only premises liability claims against Chammas, Inc. See *Travelers Indemnity Co v Bloomington Steel & Supply Co*, 718 NW2d 888, 891 (Minn, 2006) (negligent retention and supervision); *LCS, Inc v Lexington Ins Co*, 371 NJ Super 482, 487; 853 A2d 974 (2004) (negligent hiring, training, employment, and supervision); *King v Dallas Fire Ins Co*, 85 SW3d 185, 187 (Tex, 2002) (negligent hiring, training, and supervision); *Mactown, Inc v Continental Ins Co*, 716 So2d 289, 290 (Fl Dist Ct App, 1998) (negligent retention). As noted in *King*, 85 SW3d at 190, there is a divide regarding the resolution of such issues. Courts around the nation are split on the issue “whether an employer’s negligent hiring, training, and supervision is an ‘occurrence’ when an employee’s intentional conduct caused the alleged injury.” “Some courts have focused on the employee’s intentional conduct and concluded that there is no duty to defend the employer, while other courts have decided that the employer’s alleged negligent acts do constitute an occurrence.” *Id.* The core of the dispute revolves around the derivative nature of such claims. Compare *American*

Guarantee & Liability Ins Co v 1906 Co, 129 F3d 802, 810 (CA 5, 1997). There is no reason to inject this confusion into the current case. Under Michigan law, the consideration of whether an “accident” occurred focuses on “the injury-causing *act* or *event* and its relation to the resulting property damage or personal injury,” *Frankenmuth*, 460 Mich at 115 (citation and quotation marks omitted), and is considered from the standpoint of the insured that caused the injury. *Mich Basic*, 214 Mich App at 325, 327. We need not delve further.

Finally, defendants contend that the alter-ego theory is inapplicable and, regardless, the elements of the theory are not satisfied in this case. We need not reach this issue because even assuming Chammas, Inc. could establish that it was not the alter ego of Elias, there was no occurrence triggering application of the insurance policy and, thus, there is no coverage for either Elias or Chammas, Inc.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher